Supreme Court, U. S.
FILED
JAN 9 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-669

ELLSWORTH FREIGHT LINES, INC., et al.,
Appellants,

vs.

MISSOURI HIGHWAY RECIPROCITY COMMISSION, et al.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI

MOTION TO DISMISS OR AFFIRM

JOHN ASHCROFT
Attorney General

NEIL MACFARLANE
Assistant Attorney General

RICHARD L. WIELER
Assistant Attorney General
P.O. Box 899
Jefferson City, Missouri 65102
Attorneys for Appellees

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

INDEX

I. THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE 1

A. The Statute 1

B. The Proceedings Below 3

II. ARGUMENT 7

The Case Presents No Substantial Question For Review Or Decision By This Court 7

III. CONCLUSION 16

Table of Authorities

CASES

Edelman v. *Jordan*, 415 U.S. 651 (1974) 10

Ellsworth Freight Lines, Inc., et al. v. *Missouri Highway Reciprocity Commission, et al.*, S.Ct. Mo. En Banc, No. 59,981 (July 24, 1978) 6

Evansville-Vanderburgh A.A. Dist. v. *Delta Airlines, Inc.*, 405 U.S. 717 (1972) 8

Gas Service Company v. *Morris*, 353 S.W.2d 645 (Mo. 1962) 2

Kane v. *New Jersey*, 242 U.S. 160 (1916) 7

Murray v. *Wilson Distilling Company*, 213 U.S. 151 (1909) 11

Parden v. *Terminal Railway of the Alabama State Docks Department*, 377 U.S. 184 (1964) 9, 10

Petty v. *Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959) 9, 10

State ex inf. Dalton v. *Riss and Company*, 335 S.W.2d 118 (Mo. En Banc 1960) 8

State ex rel. Brady Motor, Inc. v. *State Tax Commission*, 517 S.W.2d 133 (Mo. 1974) 2, 4
Steel Haulers, Inc. v. *United States*, 316 F.Supp. 707 (W.D.Mo. 1970), aff'd, 440 F.2d 1176 (8th Cir. 1971) 12

CONSTITUTIONAL PROVISIONS AND STATUTES

Amendment XI, Constitution of the United States 9, 10
Article IV, §30, Constitution of Missouri 12
Chapter 136, RSMo 1969 ..... 4, 6
Section 136.035, RSMo 1969 .....1, 2, 4, 6, 9, 11
Section 138.430, RSMo 1969 3
Section 301.090, RSMo 1969 12
Sections 301.271-301.279, RSMo 1969 11
Section 301.272, RSMo 1969 14
Section 301.277, RSMo 1969 12

OTHER AUTHORITIES

Article III, §34, Uniform Compact 13
60 C.J.S., Motor Vehicles, §61, p. 408 7

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-669

ELLSWORTH FREIGHT LINES, INC., et al.,
Appellants,

vs.

MISSOURI HIGHWAY RECIPROCITY COMMISSION, et al.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI

MOTION TO DISMISS OR AFFIRM

The appellees move the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Missouri on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

I.

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A. The Statute

This appeal raises the question of the validity of §136.035, RSMo 1969, and the construction placed upon this Missouri statute by the Missouri Supreme Court with respect to the recovery of taxes allegedly collected illegally

by the State of Missouri. Section 136.035, RSMo 1969, provides as follows:

> "1. The director of revenue from funds appropriated shall refund any overpayment or erroneous payment of any tax which the state is authorized to collect. The general assembly shall appropriate and set aside funds sufficient for the use of the director of revenue to make refunds authorized by this section or by final judgment of court.
>
> 2. The director of revenue shall refund any overpayment or erroneous payment of any tax on intangible personal property and the amount refunded shall be charged against the next apportionment to the political subdivision which was the residence or situs of the taxpayer at the time the tax was paid.
>
> 3. No refund shall be made by the director of revenue unless a claim for refund has been filed with him within two years from the date of payment. Every claim must be in writing under oath and must state the specific grounds upon which the claim is founded."

In construing this statute, the Missouri Supreme Court has held that where the Missouri Legislature has provided a procedure for the recovery of taxes illegally collected, this procedure is exclusive and must be followed. *Gas Service Company* v. *Morris*, 353 S.W.2d 645, 654-655 (Mo. 1962), and *State ex rel. Brady Motor, Inc.* v. *State Tax Commission*, 517 S.W.2d 133, 137-138 (Mo. 1974). Section 136.035, RSMo 1969, provides the exclusive procedure in the State of Missouri for recovery of motor vehicle registration fees allegedly collected illegally or erroneously in this state. It calls for the filing of a claim for refund with the Director of Revenue, with a subsequent

right of appeal to the State Tax Commission pursuant to §138.430, RSMo 1969, should the Director's decision be adverse to the taxpayer.

B. The Proceedings Below

On October 26, 1970, the appellants on behalf of themselves and all others similarly situated filed a lawsuit in the Circuit Court of Cole County, Missouri, against the Missouri Highway Reciprocity Commission, its individual members, the State Treasurer, and the Director of the Division of Budget and Comptroller. The petition set forth four counts: Count I sought declaratory relief through interpretation of certain administrative practices, rules and regulations of the Missouri Highway Reciprocity Commission concerning the collection of motor vehicle registration fees; Count II sought injunctive relief against those practices; Count III sought recovery of registration fees allegedly collected illegally by the Missouri Highway Reciprocity Commission since 1960, along with interest thereon; and Count IV requested action in mandamus against the Director of Revenue, the Treasurer and the Comptroller for payment of the alleged excessive registration fees.

Prior to the filing of this suit three of the appellants, Ellsworth Freight Lines, Inc., Hirschbach Motor Lines, Inc., and Kroblin Refrigerated Xpress, Inc., along with two other trucking firms, Bruce Motor Freight, Inc., and Brady Motor Frate, Inc., had filed a claim for refund with the Director of Revenue in late 1969 for motor vehicle registration fees allegedly collected in violation of the Vehicle Registration Proration and Reciprocity Agreement (Uniform Compact) to which the State of Missouri was and is a party. The hearing on the applications for refund was held before the Director of Revenue on July 25, 1970,

at which time the two year statute of limitations contained in §136.035, RSMo 1969, was pointed out. Brady and Bruce appealed the decision of the Director of Revenue against their claim to the State Tax Commission and ultimately to the Supreme Court of Missouri, where it was held that the formula used by the Missouri Highway Reciprocity Commission in determining registration fees had been improper but that the two year statute of limitations contained in §136.035, RSMo 1969, was applicable. See *State ex rel. Brady Motor, Inc.* v. *State Tax Commission, supra.*

During the pendency of this lawsuit, the Director of Revenue denied the claims of Ellsworth, Hirschbach, and Kroblin. At that time, these appellants filed a petition for writ of review of the Director's decision in the Circuit Court of Cole County and also filed an application for review of the Director's decision with the State Tax Commission in order to protect themselves in the event the current lawsuit was decided adversely. The appellants have taken no further steps to perfect either of these actions. However, the State Tax Commission has set a hearing in the matter and a decision is expected in the near future.

The appellees filed a motion to dismiss the lawsuit in circuit court alleging, among other things, that the court lacked jurisdiction over the subject matter because the petition asserted a claim for money against the State of Missouri to which the State had not consented, that the appellants had not exhausted the administrative remedies available for recovery of taxes allegedly collected illegally, and that the petition constituted an improper attempt at a class action. The circuit court overruled this motion. In the answer, the appellees again raised the defense that Chapter 136 of the Revised Statutes of Missouri provided

an exclusive remedy for the recovery of taxes allegedly collected illegally.

During testimony in the circuit court below designed to establish the existence of a class, plaintiffs' witness Howard Downs, an attorney who represents the appellants, indicated that only truckers from Iowa, South Dakota, North Dakota, and Missouri were affected by the actions of the Missouri Highway Reciprocity Commission concerning registration fees. However, it was also established at that hearing that no North Dakota, South Dakota, or Missouri truckers had ever filed a claim for refund with either the Highway Reciprocity Commission or the Director of Revenue. Mr. Downs also testified that the question of whether or not claims had been filed with the Director of Revenue was immaterial because the thrust of the lawsuit was that the appellants had a right to sue on the Compact without filing any claim with the Director of Revenue.

At the time of the final hearing in the circuit court, a stipulation of facts was agreed to admitting, among other things, that the appellants' request for an injunction was now moot because the State of Missouri had ceased certain of the practices complained of, and that an amendment to the Uniform Compact in 1972 by the State of Missouri now allowed the Commission to calculate registration fees by utilizing the several formulas complained of, i.e., the application of the "compact mile" theory when dealing with truckers based in states which also applied that theory, and the "gulick gimmick" which allows the Missouri Highway Reciprocity Commission to include miles traveled by Missouri based carriers in reciprocity states when figuring registration fees due from Missouri carriers. For the same reasons, appellants indicated that they were only seeking recovery of registration fees through the license year 1972.

On appeal to the Supreme Court of Missouri, the appellees contended that the action below was an improper means of securing a refund of motor vehicle fees and that the appellants had failed to exhaust their administrative remedies. The appellants contended that they were entitled to sue in the trial court for a refund without exhausting administrative remedies because their basis for a refund was an alleged violation of "federal rights." The appellants asserted that the State of Missouri could not qualify or condition "federal rights" by local rules of practice including Chapter 136, RSMo 1969. Although recognizing that an assertion of federal rights cannot be defeated under the name of local practice, the Supreme Court of Missouri held that an assertion of "federal right" did not entitle the appellants to avoid the procedures set forth in §136.035, RSMo 1969; and that the appellants' claims were not defeated by the requirement that they be pursued through use of the remedy given by §136.035. *Ellsworth Freight Lines, Inc. et al.* v. *Missouri Highway Reciprocity Commission, et al.*, S.Ct. Mo. En Banc, No. 59,981 issued on July 24, 1978 (Appendix B of Appellants' Statement of Jurisdiction).

II.

ARGUMENT

The Case Presents No Substantial Question For Review Or Decision By This Court

In their statement of jurisdiction, appellants have pointed out that the circuit court in Missouri found that certain practices used by the Missouri Highway Reciprocity Commission in computing the amount of motor vehicle registration fees due from the appellants as a result of their activity within this state violated United States constitutional rights. In view of this and because of a claim that the State of Missouri has entered into the federal realm of interstate commerce, appellants claim that all local procedures and limitations for the recovery of taxes must be cast aside.

This is simply not true. In the first place, there are no federal laws dealing with the question of motor vehicle fees in the various states. It has long been held that the police power of a state to regulate the use of motor vehicles on its highways extends to non-residents as well as residents. *Kane* v. *New Jersey*, 242 U.S. 160, 167 (1916). Under its police power, a state may require a nonresident motor vehicle owner to register and pay a reasonable registration fee for the privilege of operating his vehicle over the highways of this state. See 60 C.J.S., Motor Vehicles, §61, p. 408. In the absence of any federal legislation by Congress under its supreme authority to regulate commerce among the states, the State of Missouri has the basic right of any sovereign to exact a fee for the privilege of operating within its territory whether it be a motor vehicle or operating a business. The motor vehicle registration fee is a tax for the privilege of using

the highways of this state. *State ex inf. Dalton* v. *Riss and Company*, 335 S.W.2d 118, 132 (Mo. En Banc 1960). It should be understood that the State of Missouri has not, by entering this Compact, thrust itself into the realm of interstate commerce or regulation of such *per se*, but rather this action constitutes an attempt to tax activities within this state with the aid of a formula developed in conjunction with certain sister states. This Court has said that a state may use various methods in imposing a fee for the privilege of using its roads as long as the fee is not excessive. It is the amount of the tax that is of central concern, not the particular formula involved. See *Evansville-Vanderburgh A.A. Dist.* v. *Delta Airlines, Inc.*, 405 U.S. 717 (1972). If it chose to do so, the State of Missouri could remove itself from this particular Compact or any other and impose a flat fee on interstate carriers for the privilege of using the roads in this state.

Having made full use of Missouri highways during this period, the burden was on the appellants to demonstrate that the fee charged them exceeded fair compensation to the state for the privilege of using the highways. The record below does not demonstrate, nor could it, that the fees actually charged and paid by the appellants were excessive or burdensome to interstate commerce. At best, it demonstrates that the Missouri Highway Reciprocity Commission deviated from the formula agreed to among it and certain sister states, a formula contained within a Compact of which the appellants were not a part. As evidenced by the stipulations filed in the circuit court, the appellants are well aware of the fact that they have no complaint as to the amount of the tax once the State of Missouri authorized use of a different formula through amendments to the Compact.

The only question remaining is whether or not the State of Missouri is compelled to forego the limitations

contained in §136.035, RSMo 1969, on the recovery of taxes collected unlawfully because of the entry by the State of Missouri into a compact with several other states in which a uniform formula for determining the annual amount of such taxes was agreed upon. Apparently, the appellants are convinced that the mere entry by the State of Missouri into the "Uniform Compact" coupled with the interstate nature of the appellants' business is sufficient to endow the appellants with certain "federal rights" of such a character that the State of Missouri is powerless to assert any exclusive statutory remedies or procedures governing the refund of taxes paid to the State of Missouri for activities conducted herein. This is not true. The facts presented below demonstrate, at best, a deviation from the agreed upon formula in calculating motor vehicle fees due from the appellants for the use of Missouri highways. This is not to suggest that the appellants, or any other taxpayer, would be powerless to prevent such activities through appropriate legal action to enjoin further unlawful conduct. However, Count III of the petition filed in the Circuit Court of Cole County Missouri, was nothing more than an attempt to obtain a refund of taxes allegedly collected illegally in a manner not authorized by Missouri statutes. Citing several cases which deal with the question of waiver of sovereign immunity by a state with respect to the Eleventh Amendment to the United States Constitution, the appellants proclaim that the governing law of this action is federal law and that all Missouri laws adversely affecting their position must be considered waived in view of an overwhelming "federal right." However, a review of the principal cases, *Petty* v. *Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959), and *Parden* v. *Terminal Railway of the Alabama State Docks Department*, 377 U.S. 184 (1964), reveals that the cases do not support the proposition for which cited.

The *Petty* case involved a suit in federal court under the provisions of the Jones Act against the Tennessee-Missouri Bridge Commission, a commission organized pursuant to a compact between the States of Tennessee and Missouri which had been specifically approved by the United States Congress pursuant to the Compact Laws of the United States Constitution. The Commission raised the question of immunity from suit pursuant to the Eleventh Amendment, which forbids suits by individuals against the state in federal courts. The critical question according to this Court was whether or not the state had intended by its action to waive traditional concepts of sovereign immunity. *Petty* v. *Tennessee-Missouri Bridge Commission, supra,* at 278. This Court found that the state had clearly waived any claim of sovereign immunity by accepting the compact agreement because it specifically provided for a right to sue and be sued in language adopted by Congress. *Petty* v. *Tennessee-Missouri Bridge Commission, supra,* at 280.

The *Parden* case involved a suit in federal court against the State of Alabama under the Federal Employers' Liability Act. The damages were suffered by the plaintiff on the job while employed by a railroad run by the State of Alabama. In determining that the defense of sovereign immunity was not available, this Court held that the State of Alabama had affirmatively waived such a defense with respect to actions under the F.E.L.A. by engaging in the business of operating a railroad. In other words, the waiver stemmed from the state's commission of an act to which Congress, in the exercise of its constitutional power to regulate commerce, had attached the condition of amenability to suit. Perhaps the best description of the impact of the *Petty* and *Parden* cases is contained in the language of *Edelman* v. *Jordan,* 415 U.S. 651 (1974), in which this Court offered the following:

> ". . . Parden, . . . involved a congressional enactment which by its terms authorized suit by designated plaintiffs against a general class of defendants which literally included States or state instrumentalities. Similarly, *Petty* v. *Tennessee-Missouri Bridge Comm'n, supra,* involved congressional approval, pursuant to the Compact Clause, of a compact between Tennessee and Missouri, which provided that each compacting State would have the power 'to contract, to sue, and be sued in its own name.' The question of waiver or consent under the Eleventh Amendment was found in those cases to turn on whether Congress had intended to abrogate the immunity in question, and whether the State by its participation in the program authorized by Congress had in effect consented to the abrogation of that immunity." At 672.

The question then is not one of federal law versus state law, but rather whether or not the State of Missouri has waived any of its statutory rights with respect to the exclusive procedures to be used in seeking refunds of taxes (§136.035, RSMo 1969) by its entry into an interstate compact with certain other sister states for the purpose of registering motor vehicles engaged in interstate commerce.

On the question of waiver of sovereign immunity, this Court has said distinctly that a waiver will be found only where stated by "the most express language or by such overwhelming implications from the text as would leave no room for any other reasonable construction." *Murray* v. *Wilson Distilling Company,* 213 U.S. 151, 171 (1909). In determining whether or not such a waiver can be found, the following facts are of importance. The Missouri Highway Reciprocity Commission was created by the Missouri Legislature in §§301.271 to 301.279, RSMo 1969. Those sections give the Commission its specific authority to enter

into direct reciprocal agreements or arrangements with other states, the District of Columbia, territories of the United States, and foreign countries under the terms and conditions set forth in §301.277, RSMo 1969. These sections do not give the Commission the power to sue or be sued, nor do they give the Commission the power to abrogate other state statutes dealing with the refund of taxes. All fees collected for the registration of motor vehicles in this state are deposited with the State Treasury to the credit of the State Highway Department Fund pursuant to §301.090, RSMo 1969. Article IV, §30, of the Missouri Constitution provides that highway funds stand appropriated, without the consent of the Legislature, for road building purposes and no other.

It seems clear then that the grant of authority to the Missouri Highway Reciprocity Commission by the Missouri Legislature was a limited grant of authority dealing only with negotiation and entry into various compacts for the purpose of establishing a fair and equitable means of taxing motor vehicles engaged in interstate commerce within this state. There is no showing that the Commission was ever authorized to abrogate traditional Missouri law with respect to the claiming of a refund for taxes collected illegally.

When referring to the compact which was entered into by the Missouri Highway Reciprocity Commission, and which forms the basis for appellants' claims for relief, it is necessary to keep in mind that proper principles of construction require that the limits established by statute on the ability to enter into a compact be given primary

way registration fees illegally collected. In fact, Article III, §34 of the compact specifically indicates that the compact is meant to change only those laws in each state pertaining to registration fees and then only to the extent provided. Indeed, it would have been outside the scope of authority granted to the Missouri Highway Repicrocity Commission to have negotiated and entered into a compact which did provide methods and procedures for refunds deviating from the standards established in Missouri by statute.

The only evidence brought forth by the appellants to show that the state had waived any of its procedural requirements concerning refund of taxes is the mere entry into the Uniform Compact by the Missouri Highway Reciprocity Commission. This certainly cannot be considered a waiver through express language or by overwhelming implication. When considered in light of the discussion above, there can be no room for any reasonable construction other than nonwaiver by the State of Missouri.

Finally, appellees would like to respond to certain allegations made by appellants. Specifically, appellants have alleged that the State of Missouri agreed to refund overcharges for highway registration fees in the event that the State of Iowa was "straightened out," and that the Missouri Highway Reciprocity Commission reneged on its promise. Appellees wish to point out the transcript below does not provide competent and substantial support for the contention that a promise was made, that it was relied upon by the trucking industry, and that the State of Missouri reneged on that so-called promise. The only reference to the matter at all is testimony by Howard Downs, attorney and witness for the appellants, that the Executive Director of the Missouri Highway Commission told the carriers in 1967 that Missouri would give refunds to over-

States, 316 F.Supp. 707 (W.D.Mo. 1970), aff'd, 440 F.2d 1176 (8th Cir. 1971). In reviewing the terms and conditions of the compact itself, it is readily apparent that no provisions are dedicated to the question of refunds of high-

charged Iowa carriers. In reviewing the Missouri statute creating the Missouri Highway Reciprocity Commission, §301.273, RSMo 1969, it is apparent that there is no such officer as an executive director (presumably the witness meant secretary), and it is equally apparent that such an individual would not have the power to authorize a tax refund under Missouri law, or a deviation from the statutory procedures for obtaining such a refund. Ruth Rackers, the assistant secretary of the Missouri Highway Reciprocity Commission and an employee of the Commission since its beginning, testified below that she did not recall any advice being given to truckers that Missouri would grant refunds if Iowa did.

Appellants have also stated that appellees deliberately stalled the administrative appeals for refund of motor vehicle registration fees to the detriment of the appellants. There is no evidence in the transcript below to substantiate this contention. Rather, it is clear that the appellants abandoned their administrative approach in favor of direct action in circuit court. Having chosen to seek refund through direct action in circuit court, appellants allowed the administrative review procedure to languish pending resolution of the direct appeal. This was done in spite of the fact that appellees raised the question of failure to follow the proper statutory procedures at every possible occasion in the court action.

III.

CONCLUSION

Wherefore, appellees respectfully submit that the question upon which this cause depends is so unsubstantial as not to need further argument, and appellees respectfully move the Court to dismiss this appeal, or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Missouri.

Respectfully submitted,

JOHN ASHCROFT
Attorney General

NEIL MACFARLANE
Assistant Attorney General

RICHARD L. WIELER
Assistant Attorney General

P.O. Box 899
Jefferson City, Missouri 65102
314/751-3321

Attorneys for Appellees